ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Establishment of a Class A Low Power	)	MM Docket No. 00-10

To: The Commission

PETITION FOR CLARIFICATION or RECONSIDERATION

I. Introduction

Resort Sports Network, Inc. ("RSN"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the Commission for Clarification or Reconsideration of its Report and Order in the above-referenced proceeding.[1] In particular, by this petition, RSN seeks a determination that low power television stations broadcasting pursuant to Special Temporary Authority ("STA") will be eligible to apply for Class A status. The Commission's *Class A Report and Order* is unclear as to whether or not a station must be licensed in order for it to be eligible for Class A status. LPTV stations that have modified their facilities and are operating pursuant to an STA, and which otherwise meet the criteria adopted by Congress for Class A stations, provide substantial service to the public, service identical to that

[1] *In the Matter of Establishment of a Class A Television Service*, MM Docket No. 00-10, FCC 00-115, released April 4, 2000 ("*Class A Report and Order*").

provided by stations operating pursuant to a license. Thus, they deserve the full protection that Congress has afforded to Class A stations. RSN seeks to clarify that any operating station that meets the statutory requirements for Class A status as articulated by Congress is eligible to file an application for primary status, whether or not such station holds a license.

1. Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a), allows "any interested person" to file a Petition for Reconsideration of a final action taken in a rule making proceeding. The *Class A Report and Order* is a final action, as the rule making proceeding was terminated by the Order. RSN, either itself or through its direct subsidiary Resort Television USA, LLC, is the licensee or permittee of three low power television stations. Specifically, RSN operates K36DB, Sweetwater Creek, Colorado, K30BS, Red Cliff, Colorado, and K19CB, Red Cliff, Colorado. Two of these stations, K30BS and K19CB, are not licensed facilities, but are instead operating pursuant to Special Temporary Authority. These stations meet the operational requirements for Class A status as set out by Congress. Thus, as RSN is directly affected by the Commission's rule changes in this matter, it has standing to seek clarification or reconsideration of the *Class A Report and Order* and does so herein.

2. Petitions for Reconsideration of a final action by the Commission must be filed within 30 days of the date of public notice of the action. 47 C.F.R. § § 1.429(d) and 1.4(b). Public notice of the *Class A Report and Order* was announced by publication in the Federal Register on May 10, 2000. Thus, petitions for reconsideration must be filed with the Commission on or before June 9, 2000. This petition, therefore, is timely filed.

II. Discussion

3. The Commission's *Class A Report and Order* fails to address the unique situation of low power television stations that have modified their facilities and are currently operating pursuant to an STA. Such stations are operating under authority granted by the Commission, but have been unable to file an application for a construction permit or a covering license due to the fact that the Commission has failed to open an appropriate filing window. In some cases these stations have been operational for years, seeking and receiving extensions of Special Temporary Authority every six months in order to continue broadcasting in the public interest pending the opening of a filing window. Therefore, even though these stations are completely built and operational, the stations do not currently hold a license because the Commission had not opened a filing window which would allow for permanent authority for the past four years.

4. Recently, the Commission released a list of stations that have timely filed a Certificate of Eligibility and subsequently been found eligible to file a Class A application. [2] This list of stations eligible to file an application for primary status did not include the two stations RSN operates pursuant to STA, however, it did include RSN's fully-licensed station. Subsequently, the Commission has issued a public notice indicating that stations which are not licensed are not eligible for Class A status – regardless of their operational status.[3] As the Certificates of Eligibility for RSN's two unlicensed stations were dismissed in that subsequent public notice, it is clear that the staff has interpreted the *Class A Report and Order* so as not to afford Class A primary status to low power stations operating pursuant to an STA. As

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[2] "*Certificates of Eligibility for Class A Television Station Status*," Public Notice, DA 00-1224, released June 2, 2000.

[3] "*Dismissal of Certificates of Eligibility for Class A Television Station Status*," Public Notice, DA 00-1229, released June 7, 2000.

demonstrated below, such an interpretation is contrary to the statutory language of 47 U.S.C. 336(f) and is patently unfair. RSN seeks clarification that all LPTV stations meeting the statutory requirements are eligible to apply for Class A status, regardless of whether the station is fully licensed or not.

A. The CBPA Does Not Draw a Distinction Between Licensed LPTV Stations and Those Operating Pursuant to an STA

5. The Community Broadcasters Protection Act of 1999 ("CBPA")[4] does not make a distinction between low power television stations broadcasting pursuant to a license and those operating pursuant to an STA, but rather affords Class A protection to any station meeting the articulated qualifications. In enacting the CBPA, Congress sought to protect low power television stations that were providing a beneficial service to the public. The goal, as articulated by Congress, was to "buttress the commercial viability of those LPTV stations which can demonstrate that they provide valuable programming to their communities."[5] To that end, Congress established the following requirements in order for a low power station to be eligible to apply for Class A primary status:

> (A)(i) during the 90 days preceding the date of the enactment of the Community Broadcasters Protection Act of 1999:
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> (I) such station broadcast a minimum of 18 hours per day;
> (II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station...; and

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[4] Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, *codified* at 47 U.S.C. § 336(f).

[5] Section-by-section analysis to S. 1948, the Act know as the "Intellectual Property and Communications Omnibus Reform Act of 1999," as printed in the Congressional Record of November 17, 1999 at pages S 14708-14726 ("Section-by-Section Analysis"), at S 14724.

(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and

(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or

(B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.[6]

Beyond these requirements, the statute places no limitation on the stations that are to be afforded primary status. While the statute occasionally refers to "licensees" of low power stations, this is simply a shorthand reference to operators of low power stations, rather than a limitation on the stations eligible to file for Class A status. Significantly, the statute does not draw any distinction between a licensed facility and a station broadcasting pursuant to a construction permit and an STA. In articulating the elements necessary to qualify for Class A status, Section 336(f)(2)(A) makes no mention of having to be a fully-licensed station. Therefore, under the plain meaning of the statute, all operational stations that can meet the requirements of 336(f)(2)(A) should be afforded primary status, provided that a certificate of eligibility and a Class A application are timely filed by the applicant and granted by the Commission.

6. The Commission states in the *Class A Report and Order* that it believes that "the basic purpose of the CBPA was to afford existing LPTV stations a window of opportunity to convert to Class A stations."[7] Clearly a station that has been operational for several years and that has consistently provided substantial local programming to its community is an "existing LPTV station" worthy of the protection envisioned by Congress. In adopting the CBPA,

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[6] 47 U.S.C. § 336(f)(2).

[7] *Class A Report and Order* at ¶ 11.

Congress stated that "low power television plays a valuable, albeit modest, role in [the video programming] market because it is capable of providing locally-originated programming to rural and urban communities that have either no access to local programming, or an over-abundance of national programming."[8] The unique service that RSN's low power television stations provide exemplifies the valuable role of LPTVs that Congress has identified. RSN's LPTV stations provide specialized, local programming, including local news and information, to their communities in the mountains of Colorado. Regardless of whether the RSN station is broadcasting pursuant to a license or an STA, each of the stations "broadcast[s] programming—including locally originated programming—for a substantial portion of each day," and thus, from a consumer's perspective RSN's stations "provide video programming that is functionally equivalent to the programming... on full-service stations."[9] The CBPA was enacted in order to afford such stations regulatory status roughly similar to that of full power stations,[10] and it is irrelevant whether the station is operating under authority granted in a license or an STA.

1. The plain language of the statute makes no mention of licensed stations and if the Commission excludes stations operating pursuant to STA it will be acting contrary to congressional intent

7. The CBPA is clear in its directive that any low power station meeting the qualifications of Section 336(f)(2)(A) shall receive Class A primary status, provided the station meets the Commission's filing requirements. The statutory language is unambiguous and does not include a requirement that a station hold a license authorization, rather than a construction permit or an STA. If the Commission interprets the statute as applying only to licensed facilities,

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[8] Section-by-Section Analysis at S 14724.

[9] Id.

[10] Id.

its actions will run contrary to Congress's stated intention of rewarding all *existing* LPTV stations broadcasting in the public interest. It is an established canon of statutory construction that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 US 102, 108 (1980). Indeed, the courts have often held that "a statute ordinarily will be construed according to its plain meaning." *In re Thinking Machines Corp.*, 67 F3d 1021, 1024-25 (1st Cir. 1995). In this case, the statute clearly contains no reference to the fact that low power stations must be fully-licensed facilities. The Commission's decision to exclude stations operating pursuant to an STA unfairly eliminates LPTV stations that were in existence and operational since before the CBPA was enacted. Moreover, it unfairly excludes stations that provide exactly the type of beneficial service that Congress sought to protect. As stated above, the overall policy and purpose of the CBPA was to protect low power stations that provide programming similar to full power stations by granting such LPTV stations primary status. If the Commission fails to implement the statute as it is plainly written, it will be acting contrary to congressional intent.

2. The Commission has failed to open a filing window to allow LPTV stations to modify their facilities and become fully licensed

8. Perhaps the most egregious aspect of this issue is the fact that many stations are not fully licensed due to the Commission's own failure to open an appropriate filling window. If the Commission had opened a filing window earlier, then LPTV stations would have been able to modify their facilities and to file a covering license application. Currently, a number of LPTV stations have modified their facilities and operate pursuant to Special Temporary Authority granted by the Commission. In particular, RSN has operated K19CB and K30BS for several years with modified facilities pursuant to STA, with the understanding from the FCC that it

would file an application for permanent authority for these operations when the FCC next opened an LPTV filing window. However, due to the Commission's infrequent filing windows for LPTV applications, RSN has been unable to file an application to request modification of the underlying construction permit.[11] The last LPTV window opened by the Commission was over four years ago in May 1996.[12] Thus, it is because of the Commission's inaction that LPTV stations such as RSN's were unable to become fully licensed prior to the enactment of the CBPA. In addition to being contrary to Congress's stated intention, it is inherently unfair for the Commission to penalize those low power stations for its own inaction.

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[11] Recently, the Commission opened a limited LPTV filing window that will allow RSN to attempt to amend the stations' underlying authorizations to specify the operational facilities. This limited window is subject to geographic restrictions and will open from July 31 through August 4, 2000, at which time RSN anticipates filing applications seeking to modify the authorizations for K19CB and K30BS. See "*Scheduling of Limited Low Power Television/Television Translator/Class A Television Auction Filing Window*," Public Notice, released May 1, 2000.

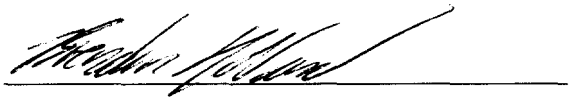
[12] *Low Power Television Service (Filing Windows)*, 102 FCC 2d 295, 57 RR 2d 234 (1984) (Report and Order instituting the use of filing windows); *Public Notice, Notice of Limited Low Power Television/Television Translator Filing Window From April 29, 1991, Through May 3, 1991,* Mimeo No. 12124 (released March 12, 1991) (No new low power applications in major urban markets); *Notice of Limited Low Power Television/Television Translator Filing Window From April 1, 1994 through April 15, 1994*, Public Notice No. 41954 (MMB Mar. 3, 1994) (Window for major modifications and new permits in areas 100 miles beyond major urban markets); *Public Notice, Notice of Limited Low Power Television/Television Translator "Major Change Only" Filing Window From April 22, 1996 through April 26, 1996*, Mimeo No. 62033, 61 Fed. Reg. 11840, published March 22, 1996. (Window for major changes only, no new construction permits); *Public Notice, Notice of Extension of Low Power Television/ Television Translator "Major Change Only" Filing Window*, Mimeo No. 62397, released April 10, 1996 (Extending window for major change applications until May 17, 1996). The last window filing for major change applications closed on May 17, 1996.

III. CONCLUSION

9. Given that low power television stations operating pursuant to Special Temporary Authority can satisfy the statutory guidelines for Class A eligibility, the Commission must clarify its rules to articulate that Class A status is available to these stations. Stations that have met the eligibility requirements and continue to broadcast in the public interest must be afforded the full measure of protection that Congress intended, regardless of whether the station holds a license or an STA. Congress made no distinction in the CBPA between licensed facilities and stations operating under a construction permit, because there is not distinction to be made. If a station was broadcasting and satisfied the eligibility criteria of 47 U.S.C. 336(f)(2) for the ninety days prior to enactment of the law, then they qualify for Class A primary status. For the foregoing reasons, Resort Sports Network, Inc. urges the Commission to clarify that eligibility for Class A primary status extends to all low power stations that meet the statutory qualifications and that have followed the Commission's procedures.

Respectfully submitted,

RESORT SPORTS NETWORK, INC.



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